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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RUSLAN BIZHKO, Defendant and Appellant.	C077941 (Super. Ct. Nos. 11F01100, 12F04706)

A jury found defendant Ruslan Bizhko guilty of arson and also found true an enhancement allegation that he used a device designed to accelerate the fire. In a separate case defendant pleaded no contest to grand theft. The trial court sentenced him to six years in state prison.

Defendant now contends the trial court prejudicially erred by failing to instruct the jury that the arson enhancement required a finding of specific intent. Disagreeing, we will affirm the judgment. Our review of the record also discloses a clerical error on the abstract of judgment. We will direct the trial court to prepare a corrected abstract.

BACKGROUND

Firefighters from the Sacramento Metropolitan Fire District responded to a residential fire around 7:00 a.m. on October 7, 2010. When Captain Robert Gorman arrived with his unit, he observed heavy smoke coming from the rear of the house. He also observed defendant and another man standing in front of the house. Captain Gorman testified that defendant had to be physically removed from the area two times because he was interfering with firefighter operations.

After the fire was suppressed, Captain Gorman smelled an odor consistent with gasoline in the hallway of the house. He also observed what appeared to be melted plastic in the middle of the hallway. While speaking with defendant, Captain Gorman noticed defendant had a burn on his foot; defendant admitted the burn was from the fire.

In his investigation of the incident, supervising fire investigator George McKinnon learned that defendant's house was bank owned, defendant was going through a divorce, and he was living with a friend. During his examination of the scene, investigator McKinnon noticed that the house was sparsely furnished and the bedrooms had no furniture in them, including the master bedroom, which had extensive fire damage. He also detected the smell of gasoline in various locations throughout the house and observed a piece of blue plastic that was melted and stuck to the carpet in the hallway. In addition, investigator McKinnon found a can of hairspray with a dart inserted into it. He also learned that a gold watch, a car key, and a red lighter had been found on the roof of the house. Defendant said he threw the lighter on the roof and admitted the car key was his, but he did not have an explanation for why the key was on the roof. Defendant claimed he had been working on the air conditioning unit, but the unit was located on the ground. When investigator McKinnon removed the carpet containing the melted plastic, the smell of gasoline was "extremely strong," causing a "[r]apid full alert" on his sniffer device. Investigator McKinnon explained the sniffer device reacts to the presence of hydrocarbons, which include ignitable, combustible, or flammable liquids.

During his interview with investigator McKinnon, defendant said he went to a gas station around 5:30 a.m. on the morning of the fire and put $5 worth of gasoline into a blue five-gallon plastic container. The container was never found. Defendant added that he owed money, had filed for bankruptcy, and believed his insurance policy covered his house until October 12, 2010. In response to the investigator's inquiry about whether he had started the fire, defendant stated, "Yeah, I just took everything, yeah, I did." The investigator sought clarification, "So you started the fire?" Defendant replied, "Uh-huh."

Based on his investigation, investigator McKinnon concluded "an ignitable liquid, such as gasoline, was dispensed through the hallway and the master bedroom floor [of defendant's house], [and was] ignited with an open-flame device, such as a disposable lighter." He further concluded "the origin . . . was in the hallway, in the bedroom, and the cause of the fire was a willful and malicious act, a very deliberate, intentionally-set fire." A carpet sample taken from the house tested positive for gasoline residue.

Defendant testified that he went to the gas station on the morning of the fire to purchase gas so that he could cut his grass before he left town on vacation. He said when he returned home he heard loud music coming from his house, and when he entered the house he heard an explosion like a bomb. Defendant said he could not remember much after that because he blacked out.

In case No. 11F01100, a jury found defendant guilty of arson. (Pen. Code, § 451, subd. (b).)[1] The jury also found true an allegation that in committing the arson defendant used a device designed to accelerate the fire. (§ 451.1, subd. (a)(5).) The trial court sentenced defendant to an aggregate term of six years in state prison, consisting of the lower term of three years on the arson offense plus three years for the arson enhancement.

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[1] Undesignated statutory references are to the Penal Code.

While defendant was out of custody pending trial in the arson case, he was charged in case No. 12F04706 with various offenses, including grand theft. (§ 487, subd. (c).) Defendant pleaded no contest to grand theft. The trial court sentenced defendant to the lower term of 16 months, to be served concurrent with the sentence imposed in the arson case.

DISCUSSION

I

Defendant contends the trial court prejudicially erred by failing to instruct the jury that the arson enhancement required a finding of specific intent. According to defendant, the jury was instructed to find only that he intentionally used an accelerating device, not that he specifically intended to accelerate the fire by using the device.

The People first respond that defendant forfeited his contention because he failed to object in the trial court. But a defendant need not object to preserve a challenge to an instruction that affects his substantial rights. (*People v. Mackey* (2015) 233 Cal.App.4th 32, 106; see § 1259.) Here, because defendant claims the trial court failed to instruct on an enhancement element, the claimed instructional error affects his substantial rights. (*People v. Banks* (2014) 59 Cal.4th 1113, 1153, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) We will address the merits of defendant's contention.

Section 451.1 provides for a three-, four- or five-year enhancement if the arson "was caused by use of a device designed to accelerate the fire or delay ignition." (§ 451.1, subd. (a)(5).) The quoted language was discussed in *People v. Andrade* (2000) 85 Cal.App.4th 579, 585-587. In that case witnesses said the defendant started a fire either by using a Molotov cocktail or by breaking a gasoline-filled bottle on the floor and then lighting a match. (*Id.* at p. 582.) According to the Court of Appeal, "the purpose of section 451.1 is to deter arson by increasing the penalties for arsonists who exhibit a

specific intent to inflict damage by causing the arson by use of a device designed to accelerate the fire." (*Andrade*, at p. 586.)

In this case, the prosecution's theory regarding the arson enhancement was that defendant used gasoline or hairspray to accelerate the spread of the fire. During closing arguments, the prosecutor stated: "There is also an allegation that needs to be proven here; that is, that [defendant] used some device or mechanism that accelerate[d] [the] fire. That he didn't just take a lighter and set it to an article of clothing, he actually used something to help burn down the house. You have two options here, the container of gasoline, that's a device that can be used to accelerate the fire. The hairspray can with a dart stuck on the side of it, that, again, can be used to accelerate fire." Following deliberations, the jury found true the arson enhancement as to the gasoline, but not as to the hairspray can.

A trial court's failure to instruct on specific intent when necessary is federal constitutional error. (*People v. Wesley* (1988) 198 Cal.App.3d 519, 524.) "We assess federal constitutional errors under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705] (*Chapman*). Under *Chapman*, we must reverse unless the People 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' (*Ibid*.) Where the trial court fails to instruct on an element of the charged offense, however, the People must make a more substantial showing. That showing is governed by *Neder v. United States* (1999) 527 U.S. 1, 17-19 [144 L.Ed.2d 35] (*Neder*), and by the California Supreme Court's decision interpreting *Neder*, [*People v.*] *Mil* [(2012)] 53 Cal.4th 400 [(*Mil*)] . . . . [¶] '*Neder* instructs us to "conduct a thorough examination of the record. If, at the end of that examination [we] cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- [we] should not find the error harmless." ' (*Mil, supra*, 53 Cal.4th at p. 417, quoting *Neder, supra*, 527 U.S. at p. 19.)

On the other hand, the error is harmless if the People can prove beyond a reasonable doubt that the omitted element was uncontested and supported by such overwhelming evidence that no rational juror could come to a different conclusion. [Citations.]" (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165-1166; see *People v. Harris* (1994) 9 Cal.4th 407, 431 [courts may consider whether the evidence presented at trial is " 'of such compelling force as to show beyond a reasonable doubt' that the erroneous instruction 'must have made no difference in reaching the verdict obtained' "].)

Among other things, the trial court instructed the jury with CALCRIM No. 250 [Union of Act and Intent: General Intent], CALCRIM No. 1502 [Arson: Inhabited Structure], CALCRIM No. 1551 [Arson Enhancements], and CALCRIM No. 3500 [Unanimity]. The trial court should have, but did not, instruct the jury with CALCRIM No. 251 [Union of Act and Intent: Specific Intent or Mental State].

However, the failure to instruct with CALCRIM No. 251 was harmless in this case and did not contribute to the jury's verdict. In finding defendant guilty of arson and finding the arson enhancement true as to the gasoline, the jury necessarily determined that defendant willfully started the fire that burned his house with the specific intent to inflict damage by using gasoline to accelerate the fire. (See *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1280 [the use of gasoline in connection with an arson exhibits " 'a specific intent to inflict damage' "].) And the evidence was overwhelming. Captain Gordon and investigator McKinnon testified they smelled an odor consistent with gasoline inside defendant's residence. Investigator McKinnon concluded an ignitable liquid such as gasoline was dispensed throughout the hallway of the house and the master bedroom, and the fire was intentionally set with an open-flame device such as a lighter. Defendant admitted purchasing gasoline that day, starting the fire, and throwing a lighter on the roof. He used a blue gas container to store the gas he purchased on the morning of the fire. The container was never located, but a piece of blue plastic was found melted and stuck to the hallway carpet in defendant's residence. When the carpet in the hallway

was removed, there was an extremely strong odor of gas. Testing on the carpet removed from defendant's residence revealed the presence of gasoline. Defendant owed money, had filed for bankruptcy, and believed his insurance policy covered his house for several more days.

We have thoroughly examined the record before us and conclude it contains no "evidence that could rationally lead to a contrary finding" on the intent element of the arson enhancement. (*Neder, supra,* 527 U.S. at p. 19.) The jury found beyond a reasonable doubt that defendant committed arson, i.e., he willfully and maliciously set fire to his residence. (See CALCRIM No. 1502.) The jury also found beyond a reasonable doubt that the arson was caused by defendant's use of gasoline to accelerate the fire. (See CALCRIM No. 1551.) In doing so, the jury rejected defendant's account of an unexplained explosion at his house. No evidence was presented suggesting the gasoline detected inside defendant's house served any purpose other than as a device intended to accelerate the fire. Nor was there any evidence presented suggesting the gasoline was ignited in defendant's house accidentally.

No rational trier of fact could have come to a different conclusion on the arson enhancement. The record demonstrates beyond a reasonable doubt that the jury verdict would have been the same absent instructional error. After finding that the arson was caused by defendant's use of gasoline to accelerate the fire, a rational juror would not fail to find defendant had the specific intent to inflict damage by using gasoline in connection with the fire. Accordingly, the trial court's failure to give the specific intent instruction did not constitute prejudicial error.

II

The People point to a clerical error in the abstract of judgment. Although the abstract correctly cites section 487, subdivision (c), it incorrectly indicates defendant was convicted of petty theft in case No. 12F04706. Defendant pleaded guilty to grand theft in that case. (§ 487, subd. (c).) This court " 'has the inherent power to correct clerical

errors in its records so as to make these records reflect the true facts.' " (*People v. Mitchell* (2001) 26 Cal.4th 181, 185, quoting *In re Candelario* (1970) 3 Cal.3d 702, 705.) We will direct the trial court to correct the abstract of judgment.

DISPOSITION

The judgment is affirmed. The trial court shall prepare a corrected abstract of judgment indicating that defendant was convicted of grand theft in case No. 12F04706, and the trial court shall forward a copy of the corrected abstract to the Department of Corrections and Rehabilitation.

/S/
MAURO, J.

We concur:

/S/
BUTZ, Acting P. J.

/S/
MURRAY, J.